



July 24, 1995
RG-173

TNRCC Guidance Document

HB 2473

Texas Environmental, Health, and Safety Audit Privilege Act

This Guidance Document is intended to assist persons in submitting notice to the Texas Natural Resource Conservation Commission (TNRCC) that a environmental or health and safety audit will be initiated pursuant to the Texas Environmental, Health, and Safety Audit Privilege Act. This guidance is not regulation and should not be used as such.



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I. INTRODUCTION

A. GENERAL INTRODUCTION

On May 23, 1995, Texas joined thirteen other states that have enacted some form of legislation which provides an environmental privilege and/or immunity. This statute primarily affects litigation between non-TNRCC parties, however, the TNRCC is also affected. This document will examine HB 2473 and give guidance to TNRCC staff and persons contemplating its use.

B. BACKGROUND

HB 2473 was proposed to encourage the voluntary compliance with health and safety and environmental laws by granting an incentive, privilege and immunity, to entities that voluntarily seek to determine the environmental, health and safety compliance status of their facility.

The following is an excerpt from the Background Section of the Bill Analysis prepared by Representative Chisum's staff.

In order to ensure compliance with increasingly complex health and safety and environmental laws, voluntary compliance audits can be a useful tool for businesses to determine if their practices conform to all applicable regulations. However, regulatory agencies and third parties can gain access to the information from a voluntarily conducted audit through discovery and use the information against the business in court. Because the nature of an audit is to discover not only if any violations inadvertently have occurred, but also what management systems led to the violation, sensitive personnel information is frequently included in the audits. This bill offers protection from discovery for information compiled during the voluntary audit and from such information being used against the company in court if certain conditions are met. To ensure that the information has been derived through a good faith audit, the privilege would not apply if it is waived, if an audit was conducted for a fraudulent purpose, or if the entity did not take appropriate efforts to comply with the law upon discovery of noncompliance. Additionally, most violations voluntarily reported to a regulatory agency could not be used as grounds for penalizing an entity for the violation if the disclosure is made promptly and the entity makes efforts to cooperate with the agency to correct the violation. However, a disclosure is not voluntary if the person making the disclosure acted with intent or knowingly regarding the commission of the violation, or if the

person's reckless disregard resulted in off-site harm.

II.

HB2473'S INFLUENCE UPON THE TNRCC

The TNRCC should encounter a slight to moderate effect from this legislation. These effects will be most noticeable in the regions and in the enforcement programs.

A. GIVING NOTICE OF A PLANNED ENVIRONMENTAL OR HEALTH AND SAFETY AUDIT.

An entity which undertakes an environmental audit is not required to give notice to the TNRCC. However, in order to take advantage of the immunity offered by HB 2473, the entity must give at least one notice to the agency.

There are two "notices" contemplated by HB 2473:

1. The notice a facility gives to the appropriate regulatory agency when it plans an audit. Although the facility is not required to give this notice to the TNRCC, it cannot take advantage of the immunity provision of the act if it fails to give notice to the TNRCC of its intention to conduct an audit. The notice must: specify the facility or portion of the facility to be audited; the audit's beginning time; and, the scope of the audit. Also, the notice may provide notification of more than one scheduled audit. (Section 10 (g)) (see also Attachment A).
2. The notice or "disclosure" made by a person to the appropriate agency when it discovers a violation as a result of an audit. A person wishing to take advantage of the immunity from penalty must make a voluntary disclosure of the violation. Among other things, a disclosure is voluntary only if it is made in writing by certified mail to the agency.

GUIDANCE - All notices regarding HB 2473 should be sent to Joe Vogel, Deputy Director, Office of Regulatory Services, P.O. Box 13087, Austin, Texas 78711-3087, MC-172. The Deputy Director's Office will then route these notices to all program areas and field operations and central records. In addition, an entity giving notice to the TNRCC of an audit may "cc" the regional office. Regional inspectors are cautioned not to schedule an inspection based solely upon the receipt of such a notice.

B. ISSUES RELATING TO THE PRIVILEGE SECTION OF HB 2473

The purpose of ordinary rules of evidence is to promote the ascertainment of the truth. Another group of rules, however, permit the exclusion of evidence for reasons wholly unconnected with the ascertainment of the truth. These reasons are found in the desire to protect an interest or relationship. The term "privilege" is used broadly to describe such rules of exclusion. Since the effect of the privilege is to bar the admission of relevant evidence, and thereby suppress the truth, privileges are recognized at common law only if the interest or relationship is of an outstanding social importance and would undoubtedly be harmed by denying recognition of the privilege. Graham, Evidence (1983).

Section 5 of HB 2473 grants a privilege from admissibility and discovery to audit reports developed according to the statute. The privilege applies to civil, criminal and administrative proceedings. The privilege does not apply to documents, reports, etc. that are required by the TNRCC to be reported under state or federal law or to information obtained independent of the audit process.

Disclosure of the audit to TNRCC staff does not waive the privilege if it is made under the terms of a confidentiality agreement between the owner/operator or the person for whom the report was prepared and the TNRCC or if the audit is submitted to the TNRCC under a claim of confidentiality. **FURTHERMORE, NO AGENCY EMPLOYEE MAY REQUEST, REVIEW, OR OTHERWISE USE AN AUDIT REPORT DURING AN AGENCY INSPECTION OF THE FACILITY.**

A party who violates the terms of a confidentiality agreement will be liable for damages caused as a result of the disclosure. **Additionally, information submitted under a claim of confidentiality is not subject to disclosure under the Texas Open Records Act and any agency employee who discloses information in violation of the confidentiality agreement is subject to criminal prosecution and up to six months in JAIL!**

GUIDANCE - Because of the substantial risks to the agency and agency staff, the TNRCC shall not agree to receive any information offered under an environmental audit privilege. If such a document or documents are submitted to the TNRCC they should be returned immediately, without review. Also, no employee should request, review, accept, or use an audit report during a facility inspection.

C. ISSUES RELATING TO THE IMMUNITY SECTION OF HB 2473

The Section 10 immunity is an immunity from an administrative, civil, or criminal penalty for the violation disclosed. This immunity does not extend to injunctive relief, compliance or technical recommendations.

GUIDANCE - TNRCC enforcement programs should take appropriate steps when a violation is disclosed as a result of an environmental audit. Staff should not alter their enforcement process for the situations, except for the exclusion of a penalty. THE PENALTY CALCULATION IS THE ONLY ISSUE WHICH WILL BE EXCLUDED AS A RESULT OF THIS LEGISLATION.

D. QUESTIONS AND ANSWERS

- Q1. Will a company be able to place all documents, correspondence and records that are not specifically required by regulation under the protection of the audit "privilege" status, limiting the field inspector to looking only at records which are mandated by rule?
- A1. ***No, the audit contemplated under this legislation is a systematic event with a start date and completion date. Only the documents communications, etc. produced from an environmental audit are privileged.***
- Q2. If there are arguments during an inspection over what is privileged and what should be available to the inspector, where and when is this resolved?
- A2. ***First, the company should not make audit reports available to inspectors. If an argument does arise during the inspection, the inspector should not insist that he be given these documents. The inspector should note, as specifically as possible, the type of documents he has been denied and refer the issue to the Enforcement Coordination and Litigation division for response.***
- Q3. If, in the course of an inspection, the inspector notes an apparent violation and the company representative says "Yes, we found that during our audit.", how should the inspector proceed?
- A3. ***Proceed as they normally would. The only thing that has changed is the application of a penalty. The decision of whether the disclosure was voluntary and preceded the inspector's discovery can be made at a later time. Meanwhile, the company should cooperate with the inspector in connection with an investigation of the issues identified***

in the disclosure.

- Q4. Is it the inspector's responsibility to clearly inform the company that he doesn't want to see or know about any audit and the company should refrain from mention of anything dealing with an audit during the inspection?
- A4. ***Although it may not be their responsibility, the inspector should take the initiative to insure that they do not request or use a privileged audit report during an inspection.***
- Q5. Who will receive and review the audits? How will an inspector know if his/her findings are already exempted by an audit?
- A5. ***The TNRCC will not receive or review a privileged audit.***
- Q6. Does this bill apply to EPA inspectors operating in Texas?
- A6. ***No.***
- Q7. If an EPA inspector requests a copy of an audit during a joint inspection, should the TNRCC inspector continue to participate?
- A7. ***Yes, but the TNRCC inspector should not review or use this document during the inspection.***
- Q8. How does an inspector document a verbal disclosure of audit information during the inspection, or do we ignore it?
- A8. ***The inspector should not receive or use privileged audit information.***
- Q9. Should the region be aware that an audit is ongoing or has been conducted at a facility under review?
- A9. ***Yes, the process of notification should provide information to the regions.***
- Q10. If an inspector documents a violation independent of any knowledge of an environmental audit, what documentation will be needed to satisfy enforcement policy makers if the entity alleges otherwise?
- A10. ***There will be a certified letter which will verify that disclosure occurred before TNRCC discovery.***

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- Q11. Does the definition of "audit report" include such routine reports as stack tests, CEM data reviews, etc so that the company, reviewing this data before it is submitted to the agency, could declare all violations before submittal and gain immunity?
- A11. *Stack tests, data reviews, etc. may be privileged under HB 2473 if they are included in the scope of the environmental audit. They may also be immune from penalties if violations found in this manner are voluntarily disclosed. However, reports, tests, etc. that are required, collected, maintained, or reported by law are not privileged.***
- Q12. Is there going to be a better mechanism than we currently use for storing and transmitting the "privileged information" of an audit within the agency and between the field and Central Office? Can we guarantee confidentiality with current procedures?
- A12. *The TNRCC will emphasize that this sort of information should not be submitted to the agency.***
- Q13. If a company notifies us of an upset condition and declares that it probably created a "nuisance" violation (or actually conducts a survey and declares a nuisance was created) and claims this as part of their environmental audit, does this preclude enforcement?
- A13. *No, nor does it preclude a penalty if appropriate.***
- Q14. Will anything other than certified mail be accepted for notification of audit results (telephone, fax, verbal communication)?
- A14. *You probably mean disclosure of a violation. The answer is No.***
- Q15. Can a company be in continuous audit? The bill limits an audit period to no more than 6 months, but can a company conduct two six month audits per year? If the company is in continuous audit, how do we handle their audit preceding or accompanying us during our inspection?
- A15. *It is doubtful that a company can be in a continuous audit and not raise the suspicion that it is conducting its audits in bad faith. However, a company may conduct several audits of different facilities during the year and certainly take advantage of the act.***
- Q16. Section 10 seems to say that any violation reported by the company during the audit period is automatically immune from enforcement. Is this true?

- A16. *No, a company is not immune from enforcement, however, it may be immune from a penalty. Also, the disclosure of the violation(s) must arise out of a voluntary environmental audit.***
- Q17. The bill appears to give the company the authority to set their compliance plan and schedule without approval from the agency. Does immunity really mean this or will we still enter "no penalty" orders with technical requirements, schedules, etc. on the violations reported in the audits?
- A17. *The immunity only applies to a penalty, the TNRCC will still bring enforcement actions containing technical recommendations when appropriate.***
- Q18. Many inspectors reviewing the bill questioned the need for field inspectors under this legislation. Many clever companies will be able to declare almost everything as immune from enforcement, making annual inspections look pretty meaningless.
- A18. *This bill provides an incentive for companies to take steps beyond those required to comply with the law. This bill will likely not be responsible for reducing TNRCC enforcement actions.***
- Q19. This bill does not make much sense and impacts the evaluation of sites for Superfund. Is this retroactive? Does this mean that no self reporting or environmental assessment by these companies can be used as data for the scoring (HRS) of these sites, even when the contamination is obvious. Do we close our eyes to historical information that falls under this category when we do Superfund investigations? I don't understand how this affects us and Superfund Site Discovery and Assessment.
- A19. *This bill was effective on May 23, 1995 and is not retroactive. The bill is designed to provide companies an incentive to perform environmental audits and to use that information to improve their operations and correct violations. The TNRCC or its contractor may independently develop this information.***
- Q20. How will the TNRCC address claims of confidentiality accompanying the self-reporting of a noncompliance discovered as a result of a privileged environmental audit?
- A20. *The notice or disclosure of an environmental violation will not be considered privileged under the act. In order for the disclosing party to be immune, it must cooperate with the TNRCC in connection with an investigation of the issues identified in the disclosure.***

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- Q21. Will all voluntarily disclosed violations be required to be listed on a regulated facility's compliance history, or will the TNRCC apply its existing rules, consistent with SB 1660, in determining which violations should be listed?
- A21. *Not all voluntarily disclosed violations must be listed on a company's compliance history. The enforcement process remains the same, with the exception of penalties, for voluntarily disclosed violations. Therefore, SB 1660 and the settlement/negotiation process between the TNRCC and the disclosing company will effect the "listing" of compliance history. In addition, a violation that has been voluntarily disclosed and to which immunity applies must be identified in a compliance history report as being voluntarily disclosed.*
- Q22. When is an audit voluntary instead of required by state law? If a company chooses to conduct an environmental audit in order to collect information necessary for an operating permit application and complete the application compliance certification, is this audit considered voluntary under HB 2473? If, after a permit is issued, a company conducts an environmental audit in preparation for the submittal of the annual compliance certification, is this audit considered voluntary under HB 2473.
- A22. *An environmental audit will be eligible for the HB 2473 privilege if it is conducted according to the terms of the legislation. Reports, records, data, communication, etc. that is required by state or federal law to be reported must be reported notwithstanding the occurrence of the audit. In addition some of the state and federal laws require a company to perform an environmental audit for compliance purposes. If a company performs a federal or state mandated audit, the information collected is not privileged according to HB 2473.*

III.
SECTION BY SECTION ANALYSIS

HB 2473, which contains fourteen sections, will be added to the Vernon's Texas Codes. The bill also amends the Texas Open Records Act at Texas Government Code, Subchapter C, Section 552, adding 552.124.

SECTION 1. SHORT TITLE. Designates short title as the Texas Environmental, Health, and Safety Audit Privilege Act.

SECTION 2. PURPOSE. States legislative purpose to encourage voluntary compliance with environmental and occupational health and safety laws.

SECTION 3. DEFINITIONS:

(a)

- (1) "Audit report" means a report described by Section 4 of this Act.
- (2) "Environmental or health and safety law" means a federal or state environmental or occupational health and safety law or rules, regulations, or regional or local law adopted in conjunction with such laws.
- (3) "Environmental or health and safety audit" means a voluntary assessment of compliance with environmental and health and safety laws or permits issued thereunder conducted by an owner or operator, employee, or independent contractor; the audit can be of a regulated facility or operation or an activity at a regulated facility or operation.
- (4) "Owner or operator" means a person who owns or operates a regulated facility or operation.
- (5) "Penalty" means an administrative, civil, or criminal sanction imposed by the state to punish a person for a violation, but does not include technical or remedial provisions ordered by a regulatory authority.
- (6) "Person" means an individual or any legal entity.
- (7) "Regulated facility or operation" means a facility that is regulated under an

environmental or health and safety law.

- (b) A person acts intentionally if the person acts intentionally within the meaning of Section 6.03, Penal Code.
- (c) For purposes of this Act, a person acts knowingly with respect to the nature of his conduct when he is aware of his physical acts. A person acts knowingly with respect to the result of his conduct when he is aware that the conduct will cause the result.
- (d) For purposes of this Act, "reckless" has the meaning assigned in Section 6.03 of the Penal Code.
- (e) The term "environmental or health and safety law" shall be construed broadly.

SECTION 4. AUDIT REPORT. Description of general components of an audit report:

- (a) Includes each document and communication produced from an environmental or health and safety audit other than those set forth in Section 8 of this act.
- (b) Lists components that may be contained in a completed audit report including:
 - (1) a report prepared by an auditor or similar person that may include the scope of the audit, information gained and findings and conclusions and recommendations, and exhibits and appendices;
 - (2) memoranda and documents analyzing applicable materials or discussing implementation issues; and
 - (3) an implementation plan or tracking system to correct past noncompliance, improve current compliance or prevent future noncompliance.
- (c) Stipulates that types of exhibits and appendices that may be contained in an audit include supporting information if it was collected or developed for the primary purpose of and in the course of an audit, including interviews with employees, field notes and records of observations, findings, opinions, suggestions, conclusions, guidance, notes, drafts, memoranda, legal analysis, drawings, photographs, laboratory data, computer or electronically generated information, maps, charts, graphs, and surveys, and other communications associated with an audit.

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- (d) Each document in an audit report should be labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT" or other similar language; failure to label does not constitute a waiver of audit privilege or create a presumption that the document is or is not privileged.
- (e) An audit shall be completed within a reasonable time not to exceed six months unless an extension is approved, based on reasonable grounds, by the governmental entity.

SECTION 5. PRIVILEGE.

- (a) This section outlines when an audit report is privileged.
- (b) Gives any part of an audit report privileged status which will not be admissible as evidence or subject to discovery in a civil action, criminal proceeding, or an administrative proceeding, except as provided by Sections 6, 7, 8, and 9 of this act.
- (c) Provides that a person cannot be compelled to testify or produce a document related to an audit if:
 - (1) the testimony or production would disclose any item listed in Section 4 which was made as part of the preparation of an audit report and is addressed in a privileged part of an audit report; and
 - (2) the person conducted any portion of the audit but did not personally observe the physical events, the person learned of the information under Section 6, or the person is a custodian of the audit results.
- (d) A person who conducts or participates in the preparation of an environmental or health and safety audit and who has actually observed physical events of violation, may testify about those events but may not be compelled to testify about or produce documents related to the preparation of or any privileged part of an environmental or health and safety audit or any item listed in Section 4 of this Act.
- (e) Prohibits a state agency from requesting, reviewing, or using an audit report in any inspection of a regulated facility or operation.
- (f) A person asserting an audit privilege carries the burden of proof that the privilege applies.

SECTION 6. EXCEPTION: WAIVER.

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- (a) The privilege does not exist if it is expressly waived by the owner or operator who prepared, or caused to be prepared, the audit report.
- (b) Disclosure of a report or related information does not waive the privilege if the disclosure is made:
 - (1) to address or correct a matter raised by the audit and is made only to an employee or contract employee, a legal representative, an officer or director of the regulated facility or a partner of the owner or operator, an independent contractor retained by the owner or operator;
 - (2) under the terms of a confidentiality agreement between the person for whom the report was prepared or the owner or operator of the regulated facility and:
 - (A) a partner or potential partner of the owner or operator of the regulated facility;
 - (B) a present or future transferee of the facility of operation;
 - (C) a present or future lending institution;
 - (D) a governmental official or a state or federal agency; or
 - (E) a person or entity engaged in the business of insuring, underwriting, or indemnifying the facility or operation; or
 - (3) is made under a claim of confidentiality to a governmental official or agency by the person for whom the audit report was prepared or by the owner or operator.
- (c) A party to a confidentiality agreement under (b)(2) of this section who violates the confidentiality agreement is liable for damages caused and for any penalties stipulated in the agreement.
- (d) Information disclosed to the government under (b)(3) of this section is not subject to the Open Records Act; if a public official, entity or employee of the government discloses such information, a Class B misdemeanor is committed.

SECTION 7. EXCEPTION: DISCLOSURE REQUIRED BY COURT OR ADMINISTRATIVE HEARINGS OFFICIAL.

- (a) Allows a court or administrative hearings official to conduct an in camera review and allow disclosure of a portion of an audit report in a civil, criminal or administrative hearing if the

determination is made that the privilege is asserted for a fraudulent purpose, the report is not subject to the privilege under Section 8 of this Act, or the portion of the audit shows evidence of noncompliance and appropriate efforts to achieve compliance were not promptly initiated after noncompliance was discovered.

- (b) The party seeking disclosure under (a) of this section carries the burden of proof.
- (c) Provides for an appeal from an administrative hearings official's decision in (a) of this section to a court of competent jurisdiction.
- (d) A person claiming the privilege is subject to sanctions as provided by Rule 215 of the Texas Rules of Civil Procedure if the court finds that the person intentionally or knowingly claimed the privilege for unprotected information as provided in Section 8 of this Act.
- (e) A determination of a court under this section is subject to interlocutory appeal to an appropriate appellate court.

SECTION 8. NONPRIVILEGED MATERIALS.

- (a) The privilege in this Act does not apply to information already required to be collected or reported under a federal or state environmental or health and safety law, information obtained by a regulatory agency through observation or sampling, or information obtained from a source not involved in the preparation of the audit report.
- (b) Allows a person to agree to conduct and disclose an audit report.

SECTION 9. COURT REVIEW AND DISCLOSURE.

- (a) Allows an attorney representing the state to obtain an audit report by criminal subpoena, discovery, or search warrant if there is reasonable cause to believe that a criminal offense has been committed under applicable law.
- (b) Requires the attorney representing the state to seal any audit report received and prohibits review or disclosure of the contents.
- (c) Gives the owner or operator 30 days to request an in camera review to determine if all or a part of a report received under (a) of this section is privileged; after 30 days any privilege is waived.

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- (d) Under a request pursuant to (c) of this section, the court shall schedule an in camera review within 45 days, and authorize the attorney representing the state to review the report subject to appropriate limitations specified in the court order to protect against unnecessary disclosure.
- (e) Allows the attorney representing the state to consult with enforcement agencies regarding the contents of a report as necessary to prepare for in camera review.
- (f) Information used under (e) of this section is confidential, may not be used in an investigation or legal proceeding, and is not subject to the Open Records Act.
- (g) States that (f) of this section does not apply to information a court finds to be subject to disclosure.
- (h) Requires a court or an administrative official to suppress evidence offered that arises from or is derived from review, disclosure or use of information obtained under this section if not authorized under this section; a party failing to comply with this section has the burden of proof that the evidence offered did not arise from and was not derived from the unauthorized review, disclosure, or use.
- (i) Allows the parties to stipulate whether information is or is not privileged.
- (j) Allows a court to compel disclosure only of parts of an audit report which are relevant to issues in dispute.
- (k) Allows a court to find any person disclosing information in violation of this section in contempt and to order appropriate relief.

SECTION 10. VOLUNTARY DISCLOSURE; IMMUNITY.

- (a) Except as provided as follows, a person making a voluntary disclosure of a violation of an environmental or health and safety law is immune from administrative, civil, or criminal penalty for the violation disclosed.
- (b) A disclosure is voluntary only if the disclosure was made promptly after the information was obtained, the disclosure is in writing to the appropriate regulatory authority by certified mail, the violation was not independently discovered by an agency with enforcement jurisdiction before the disclosure was made, the disclosure arises out of a voluntary audit, the person making the disclosure takes appropriate efforts to achieve compliance by pursuing an effort

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with due diligence and correct the noncompliance within a reasonable time, the person making the disclosure cooperates with the appropriate agency in an investigation of the issues in the disclosure and the violation did not result in injury to one or more persons at the site or substantial off-site harm to persons, property, or the environment.

- (c) Any disclosure is not voluntary if it is a report to a regulatory agency required solely by a specific condition of an enforcement order or decree.
- (d) The immunity under (a) of this section does not apply and an applicable administrative, civil, or criminal penalty may be imposed if:
 - (1) the person who made the disclosure intentionally or knowingly committed or was responsible within the meaning of Section 7.02 of the Penal Code for the commission of the disclosed violation;
 - (2) the person making the disclosure recklessly committed or was responsible within the meaning of Section 7.02 of the Penal Code for the commission of the disclosed violation and the violation resulted in substantial off-site harm to persons, property, or the environment.
 - (3) the offense was committed intentionally or knowingly by a member of the person's management and the person's policies or lack of prevention systems contributed materially to the occurrence of the violation.
 - (4) the offense was committed recklessly by a member of the person's management, the person's policies or lack of prevention systems contributed materially to the occurrence of the violation, and the violation resulted in substantial injury to persons at the site or off-site harm to persons, property, or the environment.
- (e) Any penalty imposed under (d) of this section should be mitigated by factors such as voluntariness of the disclosure, efforts to conduct audits, remediation, cooperation with government officials investigating the disclosed violation, or other relevant considerations.
- (f) In an action brought against a person for a violation for which the person claims to have made a voluntary disclosure, the person claiming the immunity has the burden to establish a prima facie case that the disclosure was voluntary; after a prima facie case of voluntary disclosure is established, other than a case in which, under subsection (d) of this section immunity does not apply, the enforcement authority has the burden of rebutting the presumption by a preponderance of the evidence or in a criminal case by proof beyond a reasonable doubt.

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- (g) In order to receive immunity, a facility conducting an environmental audit under this Act must give notice to an appropriate regulatory agency of the fact that it is planning to commence the audit. The notice shall specify the facility or portion of the facility to be audited, the anticipated time the audit will begin, and the general scope of the audit. The notice may provide notification of more than one scheduled environmental or health and safety audit at a time.
- (h) The immunity under this section does not apply if a court or administrative law judge finds that the person claiming the immunity has, after the effective date of this Act, (1) repeatedly or continuously committed serious violations, and (2) not attempted to bring the facility or operation into compliance, so as to constitute a pattern of disregard of environmental or health and safety laws. In order to be considered a "pattern," the person must have committed a series of violations that were due to separate and distinct events within a three-year period at the same facility or operation.
- (i) A violation that has been voluntarily disclosed and to which immunity applies must be identified in a compliance history report as being voluntarily disclosed.

SECTION 11. CIRCUMVENTION BY RULE PROHIBITED. Prohibits a regulatory agency from adopting a rule or imposing a condition that circumvents this Act.

SECTION 12. APPLICABILITY. This Act applies to any audit conducted on or after the effective date of this Act.

SECTION 13. RELATIONSHIP TO OTHER RECOGNIZED PRIVILEGES. This Act does not change any privilege already established under statutory or common law.

SECTION 14. AMENDMENT. This section adds Section 552.124 to the Texas Open Records Act. The added section specifically excepts any privileged information or documents from "Public Information." (Section 552.021).

ATTACHMENT A

March 19, 1997

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Mr. Joe Vogel
Office of Compliance and Enforcement
Texas Natural Resource Conservation Commission
P.O. Box 13087, MC-172
Austin, Texas 78711-3087

Re: ABC Corporation; Elgin Plant - Scheduled Environmental, Health and Safety Audit

Dear Mr. Vogel:

Please be advised that in accordance with Environmental, Health and Safety Audit Privilege Act (the "Act"), the ABC Corporation's Corporate Audit Group intends to conduct an Environmental, Health and Safety compliance audit at its Elgin Plant located at 800 N. Main, Elgin, Texas.

Pursuant to Section 10(g) of the Act, permitting immunity for violations voluntarily disclosed as a result of a compliance audit, ABC is hereby notifying you that the planned audit will commence on September 23, 1995 at approximately 9:00 A.M. and will cover _____. The scope of the audit will be to evaluate compliance with all applicable Environmental, Health and Safety regulations as well as attached permits.

Please do not hesitate to contact me at (512) 239-3420 if you have any questions or require further information regarding this matter.

Sincerely,

Manager, Environmental,
Health & Safety Affairs

cc: Region 12

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Bill Number: TX74RHB 2473
ENROLLED

Date: 5/12/95

AN ACT

relating to audits to determine compliance with certain laws,
rules, and regulations; providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. SHORT TITLE. This Act may be cited as the
Texas Environmental, Health, and Safety Audit Privilege Act.

SECTION 2. PURPOSE. The purpose of this Act is to
encourage voluntary compliance with environmental and
occupational health and safety laws.

SECTION 3. DEFINITIONS. (a) In this Act:

(1) "Audit report" means an audit report described
by Section 4 of this Act.

(2) "Environmental or health and safety law" means:

(A) a federal or state environmental or
occupational health and safety law; or

(B) a rule, regulation, or regional or local
law adopted in conjunction with a law described by Paragraph (A)
of this subdivision.

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1 (3) "Environmental or health and safety audit" means
2 a systematic voluntary evaluation, review, or assessment of
3 compliance with environmental or health and safety laws or any
4 permit issued under those laws conducted by an owner or operator,
5 an employee of the owner or operator, or an independent
6 contractor of:

7 (A) a regulated facility or operation; or

8 (B) an activity at a regulated facility or
9 operation.

10 (4) "Owner or operator" means a person who owns or
11 operates a regulated facility or operation.

12 (5) "Penalty" means an administrative, civil, or
13 criminal sanction imposed by the state to punish a person for a
14 violation of a statute or rule. The term does not include a
15 technical or remedial provision ordered by a regulatory
16 authority.

17 (6) "Person" means an individual, corporation,
18 business trust, partnership, association, and any other legal
19 entity.

20 (7) "Regulated facility or operation" means a

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1 facility or operation that is regulated under an environmental or
2 health and safety law.

3 (b) A person acts intentionally for purposes of this Act
4 if the person acts intentionally within the meaning of Section
5 6.03, Penal Code.

6 (c) For purposes of this Act, a person acts knowingly, or
7 with knowledge, with respect to the nature of the person's
8 conduct when the person is aware of the person's physical acts.

9 A person acts knowingly, or with knowledge, with respect to the
10 result of the person's conduct when the person is aware that the
11 conduct will cause the result.

12 (d) A person acts recklessly or is reckless for purposes
13 of this Act if the person acts recklessly or is reckless within
14 the meaning of Section 6.03, Penal Code.

15 (e) To fully implement the privilege established by this
16 Act, the term "environmental or health and safety law" shall be
17 construed broadly.

18 SECTION 4. AUDIT REPORT. (a) An audit report is a report
19 that includes each document and communication, other than those
20 set forth in Section 8 of this Act, produced from an

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1 environmental or health and safety audit.

2 (b) General components that may be contained in a
3 completed audit report include:

4 (1) a report prepared by an auditor, monitor, or
5 similar person, which may include:

6 (A) a description of the scope of the audit;

7 (B) the information gained in the audit and
8 findings, conclusions, and recommendations; and

9 (C) exhibits and appendices;

10 (2) memoranda and documents analyzing all or a
11 portion of the materials described by Subdivision (1) of this
12 subsection or discussing implementation issues; and

13 (3) an implementation plan or tracking system to
14 correct past noncompliance, improve current compliance, or
15 prevent future noncompliance.

16 (c) The types of exhibits and appendices that may be
17 contained in an audit report include supporting information that
18 is collected or developed for the primary purpose of and in the
19 course of an environmental or health and safety audit, including:

20 (1) interviews with current or former employees;

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- 1 (2) field notes and records of observations;
 - 2 (3) findings, opinions, suggestions, conclusions,
 - 3 guidance, notes, drafts, and memoranda;
 - 4 (4) legal analyses;
 - 5 (5) drawings;
 - 6 (6) photographs;
 - 7 (7) laboratory analyses and other analytical data;
 - 8 (8) computer-generated or electronically recorded
 - 9 information;
 - 10 (9) maps, charts, graphs, and surveys; and
 - 11 (10) other communications associated with an
 - 12 environmental or health and safety audit.
- 13 (d) To facilitate identification, each document in an
- 14 audit report should be labeled "COMPLIANCE REPORT: PRIVILEGED
- 15 DOCUMENT," or labeled with words of similar import. Failure to
- 16 label a document under this section does not constitute a waiver
- 17 of the audit privilege or create a presumption that the privilege
- 18 does or does not apply.
- 19 (e) Once initiated, an audit shall be completed within a
- 20 reasonable time not to exceed six months unless an extension is

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1 approved by the governmental entity with regulatory authority
2 over the regulated facility or operation based on reasonable
3 grounds.

4 SECTION 5. PRIVILEGE. (a) An audit report is privileged
5 as provided in this section.

6 (b) Except as provided in Sections 6, 7, 8, and 9 of this
7 Act, any part of an audit report is privileged and is not
8 admissible as evidence or subject to discovery in:

9 (1) a civil action, whether legal or equitable;

10 (2) a criminal proceeding; or

11 (3) an administrative proceeding.

12 (c) A person, when called or subpoenaed as a witness,
13 cannot be compelled to testify or produce a document related to
14 an environmental or health and safety audit if:

15 (1) the testimony or document discloses any item
16 listed in Section 4 of this Act that was made as part of the
17 preparation of an environmental or health and safety audit report
18 and that is addressed in a privileged part of an audit report;
19 and

20 (2) for purposes of this subsection only, the person

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1 is:

2 (A) a person who conducted any portion of the
3 audit but did not personally observe the physical events;

4 (B) a person to whom the audit results are
5 disclosed under Section 6(b) of this Act; or

6 (C) a custodian of the audit results.

7 (d) A person who conducts or participates in the
8 preparation of an environmental or health and safety audit and
9 who has actually observed physical events of violation, may
10 testify about those events but may not be compelled to testify
11 about or produce documents related to the preparation of or any
12 privileged part of an environmental or health and safety audit or
13 any item listed in Section 4 of this Act.

14 (e) An employee of a state agency may not request, review,
15 or otherwise use an audit report during an agency inspection of a
16 regulated facility or operation, or an activity of a regulated
17 facility or operation.

18 (f) A party asserting the privilege described in this
19 section has the burden of establishing the applicability of the
20 privilege.

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1 SECTION 6. EXCEPTION: WAIVER. (a) The privilege
2 described by Section 5 of this Act does not apply to the extent
3 the privilege is expressly waived by the owner or operator who
4 prepared the audit report or caused the report to be prepared.

5 (b) Disclosure of an audit report or any information
6 generated by an environmental or health and safety audit does not
7 waive the privilege established by Section 5 of this Act if the
8 disclosure:

9 (1) is made to address or correct a matter raised by
10 the environmental or health and safety audit and is made only to:

11 (A) a person employed by the owner or
12 operator, including temporary and contract employees;

13 (B) a legal representative of the owner or
14 operator;

15 (C) an officer or director of the regulated
16 facility or operation or a partner of the owner or operator; or

17 (D) an independent contractor retained by the
18 owner or operator;

19 (2) is made under the terms of a confidentiality
20 agreement between the person for whom the audit report was

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1 prepared or the owner or operator of the audited facility or
2 operation and:

3 (A) a partner or potential partner of the
4 owner or operator of the facility or operation;

5 (B) a transferee or potential transferee of
6 the facility or operation;

7 (C) a lender or potential lender for the
8 facility or operation;

9 (D) a governmental official or a state or
10 federal agency; or

11 (E) a person or entity engaged in the business
12 of insuring, underwriting, or indemnifying the facility or
13 operation; or

14 (3) is made under a claim of confidentiality to a
15 governmental official or agency by the person for whom the audit
16 report was prepared or by the owner or operator.

17 (c) A party to a confidentiality agreement described in
18 Subsection (b)(2) of this section who violates that agreement is
19 liable for damages caused by the disclosure and for any other
20 penalties stipulated in the confidentiality agreement.

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1 (d) Information that is disclosed under Subsection (b)(3)
2 of this section is confidential and is not subject to disclosure
3 under Chapter 552, Government Code. A public entity, public
4 employee, or public official who discloses information in
5 violation of this subsection commits an offense. An offense
6 under this subsection is a Class B misdemeanor. It is an
7 affirmative defense to the clerical dissemination of a privileged
8 audit report that the report was not clearly labeled "COMPLIANCE
9 REPORT: PRIVILEGED DOCUMENT" or words of similar import. The
10 lack of labeling may not be raised as a defense if the entity,
11 employee, or official knew or had reason to know that the
12 document was a privileged audit report.

13 SECTION 7. EXCEPTION: DISCLOSURE REQUIRED BY COURT OR
14 ADMINISTRATIVE HEARINGS OFFICIAL. (a) A court or
15 administrative hearings official with competent jurisdiction may
16 require disclosure of a portion of an audit report in a civil,
17 criminal, or administrative proceeding if the court or
18 administrative hearings official determines, after an in camera
19 review consistent with the appropriate rules of procedure, that:

20 (1) the privilege is asserted for a fraudulent

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1 purpose;

2 (2) the portion of the audit report is not subject
3 to the privilege under Section 8 of this Act; or

4 (3) the portion of the audit report shows evidence
5 of noncompliance with an environmental or health and safety law
6 and appropriate efforts to achieve compliance with the law were
7 not promptly initiated and pursued with reasonable diligence
8 after discovery of noncompliance.

9 (b) A party seeking disclosure under this section has the
10 burden of proving that Subsection (a)(1), (2), or (3) of this
11 section applies.

12 (c) Notwithstanding Chapter 2001, Government Code, a
13 decision of an administrative hearings official under Subsection
14 (a)(1), (2), or (3) of this section is directly appealable to a
15 court of competent jurisdiction without disclosure of the audit
16 report to any person unless so ordered by the court.

17 (d) A person claiming the privilege is subject to
18 sanctions as provided by Rule 215 of the Texas Rules of Civil
19 Procedure if the court finds that the person intentionally or
20 knowingly claimed the privilege for unprotected information as

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1 provided in Section 8 of this Act.

2 (e) A determination of a court under this section is
3 subject to interlocutory appeal to an appropriate appellate
4 court.

5 SECTION 8. NONPRIVILEGED MATERIALS. (a) The privilege
6 described in this Act does not apply to:

7 (1) a document, communication, datum, or report or
8 other information required by a regulatory agency to be
9 collected, developed, maintained, or reported under a federal or
10 state environmental or health and safety law;

11 (2) information obtained by observation, sampling,
12 or monitoring by a regulatory agency; or

13 (3) information obtained from a source not involved
14 in the preparation of the environmental or health and safety
15 audit report.

16 (b) This section does not limit the right of a person to
17 agree to conduct and disclose an audit report.

18 SECTION 9. COURT REVIEW AND DISCLOSURE. (a) If there is
19 reasonable cause to believe a criminal offense has been committed
20 under an environmental or health and safety law, the attorney

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1 representing the state may obtain an audit report for which a
2 privilege is asserted under this Act under a search warrant,
3 criminal subpoena, or discovery as allowed by the Code of
4 Criminal Procedure and the Texas Rules of Criminal Procedure.

5 (b) On receipt of the audit report, the attorney
6 representing the state shall seal the report and may not review
7 or disclose the contents of the report.

8 (c) Not later than the 30th day after the date an audit
9 report is received under Subsection (a), the owner or operator
10 who prepared the report or for whom the report was prepared may
11 file with a court of competent jurisdiction a petition requesting
12 an in camera review to determine whether all or a portion of the
13 report is privileged or is subject to disclosure under this Act.

14 An owner or operator who fails to file a petition under this
15 subsection within the period specified by this subsection waives
16 the privilege.

17 (d) On the filing of a petition under Subsection (c) of
18 this section, the court shall issue an order that:

19 (1) schedules the in camera review for a date not
20 later than the 45th day after the date the petition is filed; and

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1 (2) authorizes the attorney representing the state
2 to remove the seal from the report to review the report, subject
3 to appropriate limitations on distribution or disclosure of the
4 report that are specified in the order to protect against
5 unnecessary disclosure.

6 (e) The attorney representing the state may consult with
7 enforcement agencies regarding the contents of the report as
8 necessary to prepare for the in camera review.

9 (f) Information used in preparation for the in camera
10 review under Subsection (e) of this section:

11 (1) is confidential;

12 (2) may not be used in any investigation or legal
13 proceeding; and

14 (3) is not subject to disclosure under Chapter 552,
15 Government Code.

16 (g) Subsection (f) of this section does not apply to
17 information a court finds to be subject to disclosure.

18 (h) On the motion of a party, a court or the appropriate
19 administrative official shall suppress evidence offered in any
20 civil, criminal, or administrative proceeding that arises or is

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1 derived from review, disclosure, or use of information obtained
2 under this section if the review, disclosure, or use is not
3 authorized under this section. A party allegedly failing to
4 comply with this section has the burden of proving that the
5 evidence offered did not arise and was not derived from the
6 unauthorized review, disclosure, or use.

7 (i) The parties may stipulate to entry of an order
8 directing that specific information contained in an audit report
9 is or is not subject to the privilege.

10 (j) A court may compel the disclosure of only those
11 portions of an audit report relevant to issues in dispute in the
12 proceeding.

13 (k) A court may find a person who discloses information in
14 violation of this section in contempt of court and may order
15 other appropriate relief.

16 SECTION 10. VOLUNTARY DISCLOSURE; IMMUNITY. (a) Except
17 as provided by this section, a person who makes a voluntary
18 disclosure of a violation of an environmental or health and
19 safety law is immune from an administrative, civil, or criminal
20 penalty for the violation disclosed.

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1 (b) A disclosure is voluntary only if:

2 (1) the disclosure was made promptly after knowledge
3 of the information disclosed is obtained by the person;

4 (2) the disclosure was made in writing by certified
5 mail to an agency that has regulatory authority with regard to
6 the violation disclosed;

7 (3) an investigation of the violation was not
8 initiated or the violation was not independently detected by an
9 agency with enforcement jurisdiction before the disclosure was
10 made using certified mail;

11 (4) the disclosure arises out of a voluntary
12 environmental or health and safety audit;

13 (5) the person who makes the disclosure initiates an
14 appropriate effort to achieve compliance, pursues that effort
15 with due diligence, and corrects the noncompliance within a
16 reasonable time;

17 (6) the person making the disclosure cooperates with
18 the appropriate agency in connection with an investigation of the
19 issues identified in the disclosure; and

20 (7) the violation did not result in injury to one or

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1 more persons at the site or substantial off-site harm to persons,
2 property, or the environment.

3 (c) A disclosure is not voluntary for purposes of this
4 section if it is a report to a regulatory agency required solely
5 by a specific condition of an enforcement order or decree.

6 (d) The immunity established by Subsection (a) of this
7 section does not apply and an administrative, civil, or criminal
8 penalty may be imposed under applicable law if:

9 (1) the person who made the disclosure intentionally
10 or knowingly committed or was responsible within the meaning of
11 Section 7.02, Penal Code, for the commission of the disclosed
12 violation;

13 (2) the person who made the disclosure recklessly
14 committed or was responsible within the meaning of Section 7.02,
15 Penal Code, for the commission of the disclosed violation and the
16 violation resulted in substantial injury to one or more persons
17 at the site or off-site harm to persons, property, or the
18 environment;

19 (3) the offense was committed intentionally or
20 knowingly by a member of the person's management or an agent of

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1 the person and the person's policies or lack of prevention
2 systems contributed materially to the occurrence of the
3 violation; or

4 (4) the offense was committed recklessly by a member
5 of the person's management or an agent of the person, the
6 person's policies or lack of prevention systems contributed
7 materially to the occurrence of the violation, and the violation
8 resulted in substantial injury to one or more persons at the site
9 or off-site harm to persons, property, or the environment.

10 (e) A penalty that is imposed under Subsection (d) of this
11 section should, to the extent appropriate, be mitigated by
12 factors such as:

- 13 (1) the voluntariness of the disclosure;
14 (2) efforts by the disclosing party to conduct
15 environmental or health and safety audits;
16 (3) remediation;
17 (4) cooperation with government officials
18 investigating the disclosed violation; or
19 (5) other relevant considerations.

20 (f) In a civil, administrative, or criminal enforcement

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1 action brought against a person for a violation for which the
2 person claims to have made a voluntary disclosure, the person
3 claiming the immunity has the burden of establishing a prima
4 facie case that the disclosure was voluntary. After the person
5 claiming the immunity establishes a prima facie case of voluntary
6 disclosure, other than a case in which under Subsection (d) of
7 this section immunity does not apply, the enforcement authority
8 has the burden of rebutting the presumption by a preponderance of
9 the evidence or, in a criminal case, by proof beyond a reasonable
10 doubt.

11 (g) In order to receive immunity under this section, a
12 facility conducting an environmental or health and safety audit
13 under this Act must give notice to an appropriate regulatory
14 agency of the fact that it is planning to commence the audit.
15 The notice shall specify the facility or portion of the facility
16 to be audited, the anticipated time the audit will begin, and the
17 general scope of the audit. The notice may provide notification
18 of more than one scheduled environmental or health and safety
19 audit at a time.

20 (h) The immunity under this section does not apply if a

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1 court or administrative law judge finds that the person claiming
2 the immunity has, after the effective date of this Act,
3 (1) repeatedly or continuously committed serious violations, and
4 (2) not attempted to bring the facility or operation into
5 compliance, so as to constitute a pattern of disregard of
6 environmental or health and safety laws. In order to be
7 considered a "pattern," the person must have committed a series
8 of violations that were due to separate and distinct events
9 within a three-year period at the same facility or operation.

10 (i) A violation that has been voluntarily disclosed and to
11 which immunity applies must be identified in a compliance history
12 report as being voluntarily disclosed.

13 SECTION 11. CIRCUMVENTION BY RULE PROHIBITED. A
14 regulatory agency may not adopt a rule or impose a condition that
15 circumvents the purpose of this Act.

16 SECTION 12. APPLICABILITY. The privilege created by this
17 Act applies to environmental or health and safety audits that are
18 conducted on or after the effective date of this Act.

19 SECTION 13. RELATIONSHIP TO OTHER RECOGNIZED PRIVILEGES.
20 This Act does not limit, waive, or abrogate the scope or nature

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1 of any statutory or common law privilege, including the work
2 product doctrine and the attorney-client privilege.

3 SECTION 14. AMENDMENT. Subchapter C, Chapter 552,
4 Government Code, is amended by adding Section 552.124 to read as
5 follows:

6 Sec. 552.124. EXCEPTION: CERTAIN AUDITS. Any documents
7 or information privileged under the Texas Environmental, Health,
8 and Safety Audit Privilege Act are excepted from the requirements
9 of Section 552.021.

10 SECTION 15. EMERGENCY. The importance of this legislation
11 and the crowded condition of the calendars in both houses create
12 an emergency and an imperative public necessity that the
13 constitutional rule requiring bills to be read on three several
14 days in each house be suspended, and this rule is hereby
15 suspended, and that this Act take effect and be in force from and
16 after its passage, and it is so enacted.

17 _____
18 President of the Senate

Speaker of the House

19 I certify that H.B. No. 2473 was passed by the House on
20 April 26, 1995, by the following vote: Yeas 123, Nays 14, 3

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present, not voting.

Chief Clerk of the House

I certify that H.B. No. 2473 was passed by the Senate on
May 9, 1995, by the following vote: Yeas 30, Nays 1.

Secretary of the Senate

APPROVED: _____

Date

Governor